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No. 84-689

In the Supreme Court of the United States

OCTOBER TERM, 1984

BRUCE POOLAW,
Petitioner,

v.

CITY OF ANADARKO, OKLAHOMA; MAYOR OF ANADARKO, CLARK McCASKILL; CITY MANAGER, ROYCE HUNTER; FORMER ACTING CHIEF OF POLICE, J. C. GIVENS; and FORMER ACTING CITY MANAGERS, BOB WILKERSON and RON MADISON,
Respondents.

AMENDED REPLY BRIEF TO RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
REASONS FOR GRANTING WRIT	4
I Certiorari should be granted to reverse Appellate Court's denial of Title VII claim	4
II Certiorari should be granted reinstating jury award of punitive damages in the amount of $40,000.00	6
III Certiorari should be granted reversing Appellate Court's denial of a reasonable fee to successful plaintiff	9

CERTIFICATE OF SERVICE follows Brief

TABLE OF AUTHORITIES

Cases	PAGE(S)
Boyd v. *Shawnee Mission Public Schools*, 522 F.Supp. 1115 (1981)	7
Statutes	
42 U.S.C. § 1981	6, 7

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of The United States:

BRUCE POOLAW, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States District Court of Appeals for the Tenth Circuit entered in the above entitled case on June 27, 1984.

Petitioner herein filed his Petition for Writ of Certiorari to the United States District Court of Appeals for the Tenth Circuit on October 25, 1984. Respondents thereafter filed their Response Brief in Opposition to Petition for Writ of Certiorari in November, 1984. Petitioner herewith files his Amended Reply.

Respondents, in their Statement of the Case, attempt to show, as they did at trial, that they had cause to terminate Poolaw for reasons other than race. In this attempt the Respondents failed to mention that the alleged reasons they give for having terminated Poolaw's employment were considered on two different occasions by two different fact-finding bodies, and that both found in favor of Poolaw and against the accusers.

The City of Anadarko had a duty, under law, when evidence failed to support their termination of Poolaw, to reinstate him with back pay. If the City discovered new grounds to terminate, they were under an obligation to give Poolaw notice in writng of this dismissal and the grounds for same; afford him a new hearing; and pursuant to the outcome of that hearing, either reinstate Poolaw, or appeal the decision to the State Supreme Court in the event of a decision favorable to Petitioner. They did none of the above and to date Poolaw has not been reinstated.

It is respectfully suggested, the Respondent, City of Anadarko, openly shows the invidious and incestuous evil of their acts by manipulation of the ordinances and disregard for the rights of the Petitioner when they suggest that evidence of wrongdoing by the Petitioner heard by the Board justified their failure to reinstate Petitioner; notwithstanding the ruling of the Board. Respondents clearly feel they do not have to follow the rules and proper procedures provided by ordinance when the decision of the Board does not suit them. (There was no new evidence; all the evidence was considered by the Board of Review.)

An outline of events below will clarify the acts leading to the Respondents' discrimination of Bruce Poolaw:

1. The Board of Review was presented with all the evidence to support termination of Petitioner at Petitioner's initial hearing;
2. The Board of Review made its ruling in favor of Petitioner;
3. The Respondent, City of Anadarko, apparently did not like the ruling;
4. The Respondent, City of Anadarko, did not appeal the ruling as required by ordinance;
5. The ruling became final to reinstate the Petitioner;
6. A caucasian followed the same procedure and was reinstated; and,
7. Petitioner has not been reinstated or presented with new grounds not previously considered by the Board of Review.

The Charter and Ordinances require that if the Review Board's ruling was favorable to the Petitioner then Respondent was obligated to:

1. Reinstate; or,
2. Appeal the decision; or,
3. Reinstate Petitioner if appeal was favorable to Petitioner or where no appeal was lodged.

Once reinstated the only lawful remedy available to Respondents was to:

1. Fire Petitioner;
2. Give notice of cause;
3. Give a hearing before the Board of Review; and,
4. *Follow the decision of the Board of Review and/or follow appellate procedure.*

However, Respondents did not follow the same procedures they afforded caucasians; thus creating a strong inference based on real evidence of racially motivated intent but instead, arbitrarily chose to ignore the Review

Board and disregard appellate procedure to prevent Petitioner's reinstatement.

One can reasonably conclude that Respondents believe they have the power to arbitrarily refuse to follow the Board's decision, and ignore appeal procedures; and Respondents apparently further believe that since he has not been reinstated he is not employed and the City does not have to fire, notify and give notice, thus creating an unending circle of racially motivated discrimination. These same men are still in power.

Based on this arrogant disregard of Petitioner's rights under color of law the jury agreed with the Board of Review and rendered a jury verdict for $51,004.00.

It is respectfully suggested that no other conclusion can be reached than that the City intentionally and without cause denied Poolaw his Civil rights, equal protection under law and denied him due process of law, and that race was the motivating factor behind these acts. Furthermore, the City's continued denial of reinstatement or employment indicates that the jury verdict of $51,004.00 was justified.

REASONS FOR GRANTING WRIT

I

CERTIORARI SHOULD BE GRANTED TO REVERSE APPELLATE COURT'S DENIAL OF TITLE VII CLAIM.

While Respondents attempt to brush off the conflicting decisions between the Judge (holding no racial motivation) and the jury (finding there was racial motivation) by stating that reasonable men may differ. Poolaw believes that the appellate court was misled in rendering its decision upholding the lower court when one considers all the evidence.

The lower court agreed there was discrimination; but based on what one isolated juror commented to him, he assumed no racially motivated intent. The evidence revealed a clear and convincing preferential treatment of caucasians which raised a strong inference of racially motivated intent. However, when the burden shifted to the Respondents to show a legitimate, non-discriminatory reason for his firing, Respondents failed to produce such proof, and instead advanced an incredible theory that the Board of Review who found in favor of Petitioner had evidence to terminate him. This of course, begs the question. Why did the City, et al., fail to follow the appellate procedures available to them and instead flatly ignore all procedural and remedial avenues available? Where in the procedures available under ordinance is the City authorized to filier through the evidence considered by the Review Board? Of course there is no such authority and Respondents use this created technique to convince the Court of their non-discriminatory intent. The jury verdict of $51,004.00 awarded for racially motivated discrimination seems to have missed the scrutiny of the Appellate Court.

The Appellate Court further erred in discounting the Trial Court's conversation with a woman juror during a voire dire examination in another case, subsequent to the Poolaw trial but prior to the court's final judgment on the Title VII issue, which influenced if not controlled his decision.

Did the lower court query the jurors concerning damages? What would the jury have awarded if punitive damages instruction was not given? If the court had not included the instruction for punitive damages before trial

perhaps the verdict for $51,004.00 would be for actual damages; certainly they would not have been confused in their award.

Would the Judge's decision at the lower court level have been different if he were told, as counsel for Petitioner was after the jury was released, that "they took a long time in reaching a decision because they (the jurors) were split four to two to give Petitioner Two Million Dollars"?

What would the other jurors have told the Judge if he had polled them. Wasn't this juror's comment but one of six. Certainly the Judge's independent judgment was suspect subsequent to his comments on the record.

Petitioner submits that a close scrutiny of the entire transcript of the hearing on Petitioner's Title VII claim by the Appellate Court, would have, without question, shown reversible error on the part of the trial Judge, in his extraneous conversation with a juror prior to the time he had reached a final decision in this matter, as well as his prejudicial treatment of Petitioner's counsel.

II

CERTIORARI SHOULD BE GRANTED REINSTATING JURY AWARD OF PUNITIVE DAMAGES IN THE AMOUNT OF $40,000.00.

Poolaw reasserts his contention that the Appellate Court erred in upholding Trial Court's decision striking $40,000.00 in punitive damages which the jury awarded against the City of Anadarko, under 42 U.S.C. § 1981, concluding that punitive damages are not recoverable against a Municipal corporation.

It is well settled that actual and compensatory or punitive damages may properly be awarded private Plaintiffs when suing under 42 U.S.C. § 1981, even when coupled with a Title VII claim. However, the law is still unsettled and at the best unclear, as to whether or not punitive damages should be awarded against a Municipal corporation.

There is nothing inherent in Civil Rights cases, which specifically precludes an award of substantial punitive damages in appropriate instances under 42 U.S.C. § 1981. It is suggested by Petitioner that in determining the appropriate amount of punitive damages in such actions, the court should look to punitive damage awards in other intentional tort cases.

The argument that because Congress was silent with reference to punitive damages against municipal corporations one should therefore conclude that punitive damages should be disallowed, is both presumptive and faulty. There are no notes which indicate that this was the intention of Congress, or that courts should prohibit the allowance of punitive damages against municipal corporations in cases such as this under § 1981.

Judge O'Conner's opinion in the case from the District of Kansas, *Boyd* v. *Shawnee Mission Public Schools*, 522 F.Supp. 1115 (1981), was that:

> "The historical analysis and consideration of competing social policies relied on by the Court in its § 1983 cases are not found in the § 1981 area. The same preservation of traditional municipal immunity found by the *City of Newport* Court in the deliberations of the 42nd Congress with regard to § 1983 cannot be imputed to the legislators enacting § 1981."

Respondents rely heavily on the case of *City of Newport* v. *Facts Concerts, Inc.*, to support their position. However, Petitioner believes that Judge O'Conner's opinion is thorough, incisive and well thought-out, and in complete agreement that that same governmental immunity established under § 1983, should not be imputed or construed to include § 1981.

There is no question, that punitive damages can be assessed against private corporations that deny a person his Civil rights, and that said prviate corporations are directly responsible for the acts and conduct of their agents, servants and employees. Why should a municipal corporation be any different?

Respondents assert that punitive damages against a City, hurt only the innocent taxpayer. Using this same rationale, it could be stated that awards of punitive damages against a private corporation should be disallowed, because ultimately, the private corporation passes on to the consumers (also the taxpayers) its costs of paying punitive damages.

Furthermore, the Federal Government's "bail-out" of the Continental Bank of Illinois by the Federal Deposit Insurance Company, recently articulated, that the policy of spreading the risk to all citizens is good, for the reasons that the wrongful acts of the few should be distributed among the citizens, where there is a question of public trust.

Following that same rationale, it seems omnipresently clear that § 1981 was intended, and should be utilized, to allow a claimant punitive damages against a municipal corportion and vis-a-vis, spread the risk on the citizens of the municipality for the purpose of insuring that all citi-

zens within that City, will not be denied their civil rights. What greater public trust do we have than to insure that all persons retain their civil rights.

III

CERTIORARI SHOULD BE GRANTED REVERSING APPELLATE COURT'S DENIAL OF A REASONABLE FEE TO SUCCESSFUL PLAINTIFF.

Petitioner further reasserts that he has been denied equal protection under the law by the Trial Court's award and the Appellate Courts upholding, of his inadequate and unfair attorneys fee award. While Respondents contend that the $20,000.00 awarded to Petitioner's counsel was more than adequate, certainly a review of the record will show that the court was without justification in upholding the lower court's attorney fees award since the lower court ignored all guidelines for making the fee award. It should be noted that Respondents were paid that much for trial at the lower court level.

Perhaps the best indicator of Respondents incredulity is the position that a jury verdict in favor of plaintiff of $51,004.00 is insignificant and not substantial. The jury gave their award of $51,004.00 for the damages resulting to Petitioner because of blatant discrimination.

Respondents proposition that the Court should ignore the jury award of $51,004.00 and base its decision upon the amount awarded Plaintiff after remittitur, is sophistry and suggests that the court ignore all other guidelines used in determining a fair and reasonable fee established by case law.

Petitioner contends that the jury, by its award of $51,004.00, showed its intent and expressed without question their dissatisfaction with the municipal government and its employee's behavior in this case. The jury verdict exists for all the world, regardless of whether or not a judge allows or disallows such verdict to stand. Likewise, counsel for Petitioner was successful on both § 1981 and § 1983, by obtaining a verdict of $51,004.00.

Counsel for Petitioner has been in this case since October, 1978, a period exceeding six (6) years. This is the third appeal which Petitioner has had to file in an attempt to right the wrongs which have been perpetrated against Petitioner. Six years without pay and without relief.

Low attorney fee awards in cases such as this, are an absolute denial of equal protection under the law, since most plaintiffs who are discriminated against come from much lower income brackets than the companies or municipalities which commit the wrongs against them. Plaintiffs cannot compete with the type of retainers paid to the corporate giants, city and private. Therefore, if the plaintiff's attorney fee is not rendered on the guidelines established, there will develop an unwillingness of private counsel to represent the offended persons who stand alone against the giant corporate assailants.

Counsel for Petitioner was awarded $20,000.00 for fees in this matter. This amount will hardly cover the costs expended to date by counsel for Petitioner in the filing, discovery, trial preparation, and three appeals, which Petitioner has had to pursue in this matter.

Respectfully submitted,

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December, 1984

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this ..... day of December, 1984, three copies of the foregoing Amended Reply Brief to Response Brief in Opposition to the Petition for Writ of Certiorari were deposited in the United States Mails, postage fully prepaid thereon, addressed to counsel for Respondents, Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, 24th Floor, First National Center, Oklahoma City, Oklahoma 73102.

By: .....
GROVER MISKOVSKY